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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Connecticut Department	)	
of Public Utility Control to Retain	)	PR File No. 94-SP4
Regulatory Control of the Rates of	)	
Wholesale Cellular Service Providers in	)	
the State of Connecticut	)	

To: The Commission

OPPOSITION OF McCAW CELLULAR COMMUNICATIONS, INC.

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September 19, 1994

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McCaw Cellular Communications, Inc. ("McCaw"),[1/] by its attorneys, hereby submits its opposition to the above-captioned petition ("Petition") filed by the Connecticut Department of Public Utility Control ("DPUC").

Introduction and Summary

In the Second Report and Order,[2/] the Commission established a sound regulatory foundation for the continued growth and development of commercial mobile radio services ("CMRS"). The Commission correctly concluded in that proceeding that existing market conditions, together with enforcement of other provisions of Title II, render tariffing and rate regulation unnecessary to ensure that CMRS prices are just and nondiscriminatory or to protect

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1/ McCaw provides cellular service to more than 2.5 million subscribers in 24 states, including Connecticut.

2/ In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd. 1411 (1994) ("Second Report and Order").

consumers. The Commission found that imposing these requirements on cellular and other CMRS providers would not serve the public interest, and that forbearance from unnecessary regulation of CMRS providers would enhance competition in the mobile services market.[3/] Finally, the Commission assured that like mobile radio services would be subject to consistent regulatory treatment. Evaluated against these principles, the above-captioned petition must be denied.

First, Congress preempted state rate regulation because it recognized that a patchwork of inconsistent state rules would undermine the growth and development of mobile services, which, by their nature, operate without regard to state boundaries.[4/] While the statute provides a process for a state to request rate regulatory authority, it sanctions the exercise of that authority only in extreme cases: when significant market failure justifies substituting regulation for the operation of market forces.[5/] The Commission recognized that state regulation could become a burden to the development of the wireless infrastructure -- and could impede the statutory mandate for regulatory parity. Consistent with the intent of Congress, the Commission established "substantial hurdles" that a state must clear in order to justify rate regulation of CMRS providers.

3/ Id. at 1467.

4/ See H.R. Rep. No. 213, 103d Cong., 1st Sess. 494 (1993) ("Conference Report"); H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993) ("House Report").

5/ 47 U.S.C. § 332(c)(3). See also House Report at 261-62 (in reviewing petitions filed by the states, "the Commission also should be mindful of the Committee's desire to give the policies embodies [sic] in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee"). In this regard, the Commission should confirm the plain intent of Section 332(c) and preempt state regulation concerning all services offered by a commercial mobile service provider, including enhanced services as well as basic communications services.

Second, the DPUC has utterly failed to make the substantial showing required to justify the authority it seeks in the above-captioned proceeding. Rate regulation is unnecessary in light of current and reasonably foreseeable market conditions. The Commission has already determined that the level of competition in the CMRS marketplace is sufficient to support broad forbearance from rate regulation. The DPUC has provided no evidence that the level of competition in Connecticut departs significantly from the market conditions relied upon by the Commission, nor has it demonstrated that cellular carriers in Connecticut have exercised market power.

The economic analysis put forward to support the DPUC's claim for regulatory authority is fundamentally flawed. The DPUC ignores the fact that cellular carriers will soon face competition from so-called enhanced specialized mobile radio systems ("ESMRs") and from licensees using the 120 MHz of spectrum recently made available for PCS; it attempts to "prove" market concentration by using analytical tools intended to evaluate mergers rather than the appropriateness of regulation; and, in suggesting that cellular carriers have enjoyed "excess" earnings, fails to recognize the scarcity value of the electromagnetic spectrum. At most, the DPUC's flawed economic analysis demonstrates only the CMRS marketplace is not perfectly competitive. But, as the Commission itself has acknowledged, perfect competition is not a necessary prerequisite for forbearance.

Third, the DPUC erroneously asserts that the number of cellular resellers is indicative of the level of competition in the cellular marketplace. The number or financial health of cellular resellers is irrelevant to the statutory goal of ensuring that subscribers are assured of just, reasonable, and nondiscriminatory rates. There is no evidence that facilities-based carriers

are pricing wholesale service in a discriminatory manner. In any event, such carriers remain subject to the statutory prohibition on unreasonable discrimination. The appropriate remedy for a claim of discrimination is the complaint process rather than the imposition of burdensome and unnecessary rate regulations.

Fourth, the DPUC fails to demonstrate that consumers would benefit from regulation. Price controls limit the ability of regulated firms to respond to changes in technology and in cost and demand conditions. Rate regulation also deters new investments, improvements in service quality, and new entrants in the marketplace. By seeking to impose rate regulation solely on cellular operators, moreover, the DPUC would reestablish the very regulatory disparities that last year's comprehensive amendment of Section 332(c) of the Communications Act was intended to correct.

The public interest is better served by the regulatory forbearance embodied in the Second Report and Order and the introduction of additional competition through the allocation of new spectrum for CMRS, and Congress intended for these policies to be given "adequate opportunity to yield the [anticipated] benefits of increased competition and subscriber choice" before state rate regulation was imposed on CMRS providers.[6] Given the acknowledged harms from such regulation and the DPUC's failure to demonstrate the need to impose price controls on cellular carriers, the Petition should be denied.[7]

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[6] House Report at 261.

[7] It is important to bear in mind that denial of the petition does not foreclose state regulatory authorities from returning to the Commission at a later date should evidence appear that consumers are indeed being injured because rate regulation is not being exercised at the state level. Thus, the burden of proof is properly placed on the petitioning state to show why free market forces should not be given a chance to operate now.

I. SECTION 332(c) AND THE SECOND REPORT AND ORDER IMPOSE AN EXTREMELY DEMANDING STANDARD FOR THE AUTHORIZATION OF STATE REGULATION OF CELLULAR SERVICES

In evaluating the DPUC's Petition, the Commission must resist the invitation of Connecticut to engage in a de novo analysis of competition in cellular markets and the appropriate regulatory framework for addressing these market conditions. The Second Report and Order clearly sets forth the Commission's general analysis with respect to the level of competition in cellular markets, and makes fundamental policy choices with respect to appropriate regulation. These fundamental policy decisions, as well as the framework established by Section 332(c), dictate that the grant of state petitions to permit rate or tariff regulation should be very much the exception rather than the rule.

In any petition for rate regulation authority, the statute and the Commission's rules clearly place the burden on the petitioning state to justify the need for such authority. The DPUC has failed to meet that burden. Rather, there appears to be little basis for the DPUC's Petition other than a regulatory philosophy and a set of underlying assumptions that are fundamentally at odds with the basic framework adopted by the Commission in the Second Report and Order.[9/] In the absence of the proof required by the Commission, the DPUC's Petition must be rejected.

The Commission has already determined that the level of competition in the CMRS marketplace, together with enforcement of other provisions of Title II, render tariffing and rate

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[9/] In this regard, it is noteworthy that two of the states filing petitions both opposed forbearance from regulation at the federal level, in addition to seeking to preserve state authority. See Comments of the State of California in Gen. Docket No. 93-252; Comments of the State of New York in Gen. Docket No. 93-252.

regulation unnecessary to ensure that CMRS prices are just and nondiscriminatory or to protect consumers.[9/] Inasmuch as the Commission did not insist on perfect competition as a prerequisite for deregulation,[10/] the "substantial hurdle" to be met by states seeking to regulate cellular services cannot be satisfied with Connecticut's dubious evidence of market imperfections or less than fully competitive conditions. Rather, the Second Report and Order suggests a three-part test, with each state required to meet its burden of proof on each part of the test.

First, to support a petition for rate authority, the petitioning state must show that market conditions unique to that state are substantially less competitive and substantially more likely to cause harm to consumers than the market conditions that have been found generally to support the Commission's decision to forbear from rate and tariff regulation. Second, since the Commission expressly relied upon the continuing applicability of Section 201 and 202's requirements for just, reasonable, and not unreasonably discriminatory rates, and the availability of the complaint procedure under Section 208 to address any residual competitive problems, the DPUC must demonstrate that whatever unique competitive problems it has identified cannot be adequately addressed through these Federal remedies. Finally, in the unlikely event that a state can satisfy the factors described above, it must also show that any residual risks to consumers, i.e., the marginal benefits of the proposed state regulation, outweigh the substantial costs associated with regulation. As a threshold matter, of course, the state must also "identify and provide a detailed description of the specific existing or proposed rules that it would establish

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9/ Second Report and Order, 9 FCC Rcd. at 1467.

10/ See, e.g., id. at 1472.

if [the Commission] were to grant [the state's] petition."[11/] Approval of a state petition that fails to meet this test would contravene the statutory framework, resulting in the imposition of rate regulation under circumstances in which the Commission itself has found such regulation to be unnecessary and counterproductive.

A. State Regulation Is Presumptively Inconsistent With The Objectives Of Section 332(c) As Implemented By The Commission

Congress' adoption of amendments to Section 332 in the Budget Act was based upon three overarching policy objectives: first, the need for symmetrical regulation of competitive service providers, notwithstanding the anachronistic regulatory categories of the past; second, the need for a consistent and coherent national regulatory framework for mobile services, which by their nature are not confined by state boundaries; and third, the need to minimize regulatory distortions of free market competition so that competitive success is dictated not by regulation but by success in meeting the needs of consumers. State regulation in general, and regimes that regulate only cellular carriers in particular, of the sort proposed by Connecticut are inherently inconsistent with these objectives. Fidelity to the statutory framework, as interpreted by the Commission in the Second Report and Order, dictates a very substantial burden of proof on the states to justify any proposed state regulation.

With respect to the first objective, Congress revised Section 332 because it found that the regulatory structure governing mobile services -- which permitted "private" mobile services to escape regulation while functionally equivalent "common carrier" services were subject to state as well as Federal rules -- could "impede the continued growth and development of

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11/ Second Report and Order, 9 FCC Rcd. at 1505.

commercial mobile services and deny consumers the protections they need."[12/] Congress recognized that the implementation of the original Section 332 had created a cockeyed marketplace in which enhanced specialized mobile radio licensees, but not their cellular competitors, were exempt from Title II of the Communications Act and from state regulation, and where radio common carriers were forced to compete against private carrier paging operators that faced essentially no regulation at the Federal or state level.[13/]

In the Second Report and Order, the Commission appropriately emphasized these considerations in fashioning critical elements of the regulatory scheme for commercial mobile radio services. Thus, the Commission concluded that its elaboration of the elements of the commercial mobile radio service definition would

> ensure[] that competitors providing identical or similar services will participate in the marketplace under similar rules and regulations. Success in the marketplace thus should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs -- and not by strategies in the regulatory arena. This even-handed regulation, in promoting competition, should help lower prices, generate jobs, and produce economic growth.[14/]

Both Congress and the Commission expressed serious concern, however, that this "even-handed regulation" could be disrupted by state regulation. The legislative history of the Budget Act instructs the Commission to "ensure that [state] regulation is consistent with the overall intent...that, consistent with the public interest, similar services are accorded similar regulatory

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12/ House Report at 260.

13/ See id. at n.2.

14/ Second Report and Order, 9 FCC Rcd. at 1420.

treatment."[15/] The Commission echoed this concern in observing that "our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity."[16/]

The DPUC's Petition proposes exactly the sort of regulation which Congress feared, and which the Commission sought to avoid in adopting its preemption rules. By proposing only to regulate cellular carriers, the state of Connecticut has in essence proposed to maintain at the state level exactly the sort of asymmetrical regulation which led to the adoption of the amendments to Section 332 in the first place.

It is equally clear that state regulation is presumptively incompatible with Congress' express desire for uniform national regulation of commercial mobile services. Enactment of revised Section 332 was guided by a recognition that Federal jurisdiction was the most appropriate regulatory locus for mobile services "that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[17/] Again, the Second Report and Order was careful to carry out this objective. As the Commission observed,

> [W]e have engendered a stable and predictable federal regulatory environment, which is conducive to continued investment in the wireless infrastructure. Our definition of CMRS not only represents fidelity to congressional intent, but also

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15/ Conference Report at 494.

16/ Second Report and Order, 9 FCC Rcd. at 1421.

17/ House Report at 260. See also Conference Report at 490 (intent of revised Section 332 is to "establish a Federal regulatory framework to govern the offering of all commercial mobile services") (emphasis supplied).

> establishes clear rules for the classification of mobile services, minimizing regulatory uncertainty and any consequent chilling of investment activity.[18]

State regulation of the sort proposed by Connecticut also undermines Congress' express instruction that the Commission carefully consider whether market conditions justify forbearance from most forms of regulation under Title II of the Communications Act. In interpreting this mandate, the Commission established "as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees who are classified as CMRS providers..."[19] Thus, the Commission concluded that

> In deciding whether to impose regulatory obligations on service providers under Title II, we must weigh the potential burdens of those obligations against the need to protect consumers and to guard against unreasonably discriminatory rates and practices. In making this comparative assessment, we consider it appropriate to seek to avoid the imposition of unwarranted costs or other burdens upon carriers because consumers and the national economy ultimately benefit from such a course.[20]

Further, the Commission emphasized the need to

> ensur[e] that regulation is perceived by the investment community as a positive factor that creates incentives for investment in the development of valuable communication services -- rather than as a burden standing in the way of entrepreneurial opportunities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.[21]

The same factors which militate strongly against regulation at the federal level militate equally strongly against burdensome regulation at the state level.

18/ Second Report & Order, 9 FCC Rcd. at 1421 (emphasis supplied).

19/ Id. at 1418 (emphasis supplied).

20/ Id. at 1419.

21/ Id. at 1421.

In light of these Congressional objectives, and the policy decisions embodied in the Second Report and Order, the Commission properly established a strong presumption against granting state petitions for authority to regulate commercial mobile services, including cellular services. The Commission acknowledged that Congress made a fundamental choice "generally to preempt state and local rate and entry regulation of all commercial mobile radio services..."[22/] The Commission thus "vigorously implemented the preemption provisions of the Budget Act,"[23/] by requiring that states "clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers."[24/]

Beyond these clear, if general, statements, the Commission's substantive analysis of competition in cellular markets and the appropriateness of regulation establishes several important benchmarks for evaluating state showings. Based on the Commission's analysis and conclusions, McCaw submits that the states must provide conclusive proof on three independent issues before a petition to retain or impose regulation may be granted.

B. The DPUC Must Demonstrate That Prevailing Market Conditions In Connecticut Are Substantially Less Competitive Than The Commission Found Generally; That Federal Remedies Are Inadequate To Address Such Conditions; And That Any Residual Benefits Of State Regulation Outweigh The Costs Of Regulation Recognized By The Commission

The DPUC's Petition cannot be evaluated in a vacuum. Rather, the Commission must take as the starting point for its analysis the policy decisions and conclusions already made in the Second Report and Order. Connecticut loses sight of the fact that the Commission has

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22/ Id. at 1504 (emphasis supplied).

23/ Id. at 1419.

24/ Id. at 1421.

already considered whether competitive conditions in cellular markets warrant various forms of regulation, and found that they do not. The Commission has also held that the regulatory framework it has adopted should suffice to remedy competitive abuses or unjust and discriminatory rates. Finally, the Commission has generally found that rate, entry and tariff regulations, as a general matter, are costly and burdensome and should be avoided wherever possible.

Each of these findings strongly reinforces the presumption against state regulation. Looked at another way, in order to justify state regulation, Connecticut must be required to produce evidence that each of these general conclusions is not warranted with respect to the unique conditions in that state. If, on the other hand, Connecticut fails to carry its burden of proof on each of these issues, its Petition must be denied.

The DPUC's Petition sets forth a variety of purported "evidence" in an attempt to establish that the market for provision of cellular service in Connecticut is less than fully competitive. While this Opposition will conclusively demonstrate that none of this "evidence" supports such a conclusion, it is critical to keep in mind that the Commission adopted its forbearance regime even though it was unable to conclude, on the record before it, that cellular markets were fully competitive. Thus, after an extended discussion of the record with respect to the competitiveness of cellular markets, the Commission concluded that

> [i]n summary, the data and analyses in the record support a finding that there is some competition in the cellular services marketplace. There is insufficient evidence, however, to conclude that the cellular services marketplace is fully competitive.[25/]

25/ Id. at 1472.

Despite the Commission's unwillingness to find that the cellular market was "fully competitive" on the record before it, the Commission expressly refused to find that the competitive imperfections in these cellular markets warranted tariff, entry or rate regulation. To the contrary, the Commission found that the record established that "there is sufficient competition in this marketplace to justify forbearance from tariffing requirements."[26/] Similarly, the Commission observed that "there is no record evidence that indicates a need for full-scale regulation of cellular or any other CMRS offerings."[27/]

As a legal matter, by expressly forbearing from entry, rate or tariff regulation of cellular services, the Commission found, under the statutory standard, that such regulation was "not necessary to ensure that the charges, practices, classifications, or regulations for or in connection with CMRS are just and reasonable and are not unjustly or unreasonably discriminatory"[28/] and that such provisions are "not necessary for the protection of consumers."[29/] This is the same standard applicable to state petitions for rate regulatory authority.[30/] A state cannot satisfy this standard merely by submitting evidence that competition in cellular markets is less than perfect. Rather, states must be required to show that market conditions in their state are substantially less competitive than those which the Commission found not to justify regulation at the federal level.

26/ Id. at 1478.

27/ Id. (emphasis supplied)

28/ Id.

29/ 47 U.S.C. § 332(c)(1).

30/ Compare id. with 47 U.S.C. § 332(c)(3).

Even if a state succeeds in demonstrating the existence of competitive conditions worse than those already considered by the Commission, which the DPUC has not, this does not end the inquiry. In deciding to forbear from regulation at the federal level, the Commission found that

> continued applicability of Sections 201, 202 and 208 will provide an important protection in the event there is a market failure. . . . In the event that a carrier violate[s] Sections 201 [requiring interconnection] or 202 [prohibiting unjust and unreasonable rates and practices], the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act.[31/]

The requirement of just, reasonable, and nondiscriminatory rates and the ongoing availability of the complaint process serve also to remedy potential abuses that may arise in the states. In order to support a finding that state regulation is necessary to protect consumers from unjust and unreasonable rates or discrimination, a state must demonstrate that the Federal requirements and procedural remedies preserved in Section 332(c) are inadequate to eliminate any abuses or potential for abuse proven by that state. This the DPUC has failed to do.

Even if a state were able to demonstrate unique competitive conditions and that Federal law is insufficient to address these conditions -- a showing that none of the petitioning states has satisfied -- the state must make the further showing that, on balance, state regulation is an appropriate response and produces net benefits. As the Commission has recognized time and again, the mere fact that regulation has benefits does not end the inquiry. As the Commission

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31/ Second Report and Order, 9 FCC Rcd. at 1478-79.

observed in the context of tariffing requirements, regulation "imposes administrative costs and can [itself] be a barrier to competition in some circumstances."[32/]

The Second Report and Order itself identified substantial costs associated with tariffing, one of the major regulatory requirements proposed by the DPUC,[33/] and found that "[i]n light of the social costs of tariffing, the current state of competition, and the impending arrival of additional competition, particularly for cellular licensees, forbearance from requiring tariff filings from cellular carriers, as well as other CMRS providers, is in the public interest."[34/] Fidelity to this analysis clearly requires that a state seeking to impose regulation show that any demonstrated benefits to state regulation outweigh these costs. The DPUC's Petition fails even to recognize the need to make these showings. As demonstrated below, its Petition must be denied.

32/ Second Report and Order at 1479.

33/ The Commission observed

> [i]n a competitive environment, requiring tariff filings can (1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings; (2) impede and remove incentives for competitive price discounting, since all price changes are public, which can therefore be quickly matched by competitors; and (3) impose costs on carriers that attempt to make new offerings.... tariff filings would enable carriers to ascertain competitors' prices and any changes to rates, which might encourage carriers to maintain rates at an artificially high level. Moreover, tariffs may simplify tacit collusion as compared to when rates are individually negotiated, since publicly filed tariffs facilitate monitoring.... [T]ariffing, with its attendant filing and reporting requirements, imposes administrative costs upon carriers. These costs could lead to increased rates for consumers and potential adverse effects on competition.

Id.

34/ Id.

II. THE DPUC HAS FAILED TO DEMONSTRATE THAT RATE REGULATION IS NECESSARY TO PROTECT CONSUMERS

A. The DPUC Unjustifiably Seeks Authority To Retain Regulatory Authority Over Cellular Carriers

The DPUC requests authority to continue its regulation of wholesale cellular carriers until it concludes a review of competition in the CMRS market beginning July 1, 1996.[35/] If after such review, the DPUC finds that the market is not yet "effectively" competitive, it requests authority to continue its regulations until October 1, 1997.[36/] In reaching the conclusion that the market was not yet effectively competitive, the DPUC relied heavily on "evidence" submitted by reseller-competitors of the cellular carriers. These competitors alleged that the wholesale cellular carriers were engaging in anticompetitive and discriminatory practices.[37/] Based on these and other submissions, the DPUC concluded that market conditions were not adequately protecting consumers from unjust or unreasonably discriminatory cellular rates or practices.[38/] As demonstrated below, the DPUC's analysis of each of these "criteria" fails to justify its proposed regulation.[39/]

The Petition also fails to provide any factual evidence that the rate regulation that has been in place since 1986, has provided any benefits whatsoever to the public, much less

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35/ DPUC Petition at 5.

36/ Id. at 2.

37/ Id. at 1-2.

38/ Id. at 2.

39/ See Declaration of Bruce M. Owen, President, Economists Incorporated ("Owen Declaration"), attached hereto as Exhibit A. At McCaw's request, Economists Incorporated undertook an economic analysis of the need for and potential effects of state rate regulation of CMRS providers.

outweigh its costs, even if the degree of competition in the current cellular market is as limited as the DPUC contends. The Petition presents no evidence justifying a finding that the future effects of such regulation would have any different impact on the market.

The Commission has already embarked on the most appropriate regulatory strategy for enhancing the competitiveness of the CMRS marketplace: the allocation of additional spectrum to mobile services. This approach will increase supply and facilitate new entry without artificially propping up of resale competitors that do not increase supply or infrastructure facilities. The Commission's actions render the DPUC's proposed regulations unnecessary.

B. The DPUC's Regulatory Policy Is Erroneously Premised On Creating And Maintaining Viable Retail Resellers

It is evident that the DPUC believes the protection of retail cellular resellers by means of government-controlled wholesale prices will materially increase the competitiveness of the cellular marketplace for end users. The DPUC's efforts to structure its regulation to the benefit of resellers is misplaced. The Commission's resale policy was designed primarily to prevent discriminatory pricing and to promote other consumer benefits, not to create the type of protected class for resellers that Connecticut seeks to perpetuate in its Petition.[40] The failure of the resale industry to develop as the state hoped does not "prove" the existence of market conditions required to justify state rate regulation. Indeed, the Commission warned that "[r]esellers should be cognizant of the risks inherent in their venture into the communications

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[40] Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services, 60 F.C.C. 2d 261 (1976) (Resale Order).

field."[41] The health of the resale industry is irrelevant to the determination of whether the CMRS market protects consumers.

It is incorrect to believe, as it appears the DPUC does, that government management and oversight of the relationship between the cellular carriers' wholesale and independent resellers will enhance the level of competition in the CMRS marketplace.[42] In order to reduce prices, a regulatory policy would need to increase capacity and output in the market. Regulations aimed at ensuring resellers a market share are likely to reduce returns for CMRS carriers, deter investment, and thereby reduce capacity below levels that would result from market forces.[43] In short, the DPUC's efforts to promote the growth of a reseller industry raises prices to consumers.

The DPUC appears to be concerned that, in the absence of regulation, facilities-based carriers will inflate wholesale prices and run their retail operations at a loss in order to put independent resellers in a price squeeze.[44] There is, however, no persuasive evidence that the exercise of market power by cellular carriers is a significant problem.[45] In the absence of market power, there is every reason to believe that those carriers would have a strong incentive to have their retail marketing done in the most cost efficient manner, regardless of whether that

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[41] Resale Order, 60 F.C.C. 2d at 302.

[42] DPUC Petition at 3-4.

[43] Owen Declaration at 9.

[44] DPUC Petition at 2-3. While Connecticut resellers allege that wholesale cellular carriers engage in coercive and anticompetitive tactics in dealing with the independent resellers, the DPUC apparently has not investigated the veracity of these charges. The Commission should disregard such unsupported and unconfirmed allegations.

[45] Owen Declaration at ¶ 57.

involved independent resellers or vertical integration or both.[46] Minimization of costs contributes to profits both directly and by enabling the firm to reduce prices and increase sales.[47] Even if facilities-based carriers enjoyed market power, they would exploit their position most effectively by raising the price of their services rather than discriminating against resellers. To the extent that resellers play an important role in marketing the services of a facilities-based carrier, the latter's attempt to squeeze resellers would simply increase its own costs of providing service to consumers.[48] In many cases in which a wholesale supplier offers service both through company-owned retail outlets and through independent resellers, complaints by the resellers are common.[49] Their existence is not evidence of anticompetitive behavior, however.[50]

C. The DPUC's Economic Analysis of The Connecticut Cellular Market Fails to Justify the Imposition of Rate Regulation on Cellular Providers

The Commission has found that the CMRS marketplace is sufficiently competitive to justify forbearance from rate and tariff regulation.[51] Nothing in the DPUC's Petition undermines this conclusion with respect to Connecticut. In fact, the DPUC does not even claim to be able to show that rates charged to subscribers are unjust or unreasonable. Rather, it states

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[46] Id.

[47] Id.

[48] Id. at ¶ 59.

[49] Id. at ¶ 52.

[50] Id.

[51] See Second Report and Order, 9 FCC Rcd. at 1470, 1472, 1478.

only that it wants to further examine cellular carriers' financial performance and the relationship between their rates and costs.[52/]

The DPUC has failed to demonstrate the exercise of market power by cellular carriers, including supracompetitive pricing, and its claims of anticompetitive behavior are based on faulty economic analysis. The DPUC has also failed to show any benefits from its past regulation of cellular carriers, and its Petition ignores the substantial costs that rate regulation imposes upon service providers and the public. By contrast, there is evidence of sufficient competitive behavior and consumer benefits in the CMRS marketplace to justify the preemption of economic regulation by the DPUC. The increasing competition in the CMRS marketplace further supports preemption of state rate regulation.[53/]

In order to determine whether there is a need for regulatory intervention, market share and concentration must be computed for properly defined antitrust markets. The DPUC ignores the fact that the mobile telecommunications marketplace is becoming increasingly competitive. The Commission is currently in the process of licensing digital broadband personal communications systems ("PCS") that will compete with existing CMRS providers. ESMRs are also consolidating their facilities into a nationwide network.[54/] Digital PCS systems and ESMRs, moreover, are likely to have more effective capacity than cellular systems, which will have to support a substantial analog customer base for the foreseeable future.[55/] Even in

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[52/] DPUC Petition at 4.

[53/] Second Report and Order, 9 FCC Rcd. at 1470, 1472, 1478-1479.

[54/] Owen Declaration at ¶ 27; accord Second Report and Order, 9 FCC Rcd. at 1470.

[55/] See Owen Declaration at ¶ 46.

advance of the entry of new market participants, the real price of cellular service, after adjusting for inflation, has declined.[56/]

Regulation can be justified only if there is evidence of market power or a likelihood that such power will be exercised in the future. There is no evidence that the CMRS marketplace in Connecticut suffers from either defect.

1. The DPUC's Use of The Justice Department Merger Guidelines As The Framework of Its Analysis Is Erroneous

The DPUC adopts the Department of Justice's Horizontal Merger Guidelines (the "Guidelines") as the framework for its analysis of the competitiveness of the Connecticut cellular market, despite the fact that the DPUC is arguing for the imposition of regulation on an existing entire industry, not analyzing the projected effect on competition of a proposed merger of specific firms.[57/] The DPUC's reliance on the Guidelines, and their measurement procedures in this instance is misplaced. The Guidelines are aimed at stopping mergers that may have the effect of reducing competition; their concern is with an incipient effect on competition. The Guidelines and their associated analytical mechanisms are not necessarily applicable in determining whether prices at present are above competitive levels, whether companies are engaged in other anticompetitive activities, or whether regulations to deal with such problems would be appropriate.[58/]

The standards embodied in the Guidelines are much stricter than the appropriate standards for evaluating the appropriateness of a decision to regulate a market, as the Department of

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[56/] Id. at ¶ 42.

[57/] Connecticut Petition at 4.

[58/] Owen Declaration at ¶ 34.

Justice has explicitly recognized.[59] Thus, application of these standards might find a proposed merger would be undesirable from a policy perspective because it held the potential to reduce competition, while even after the merger competitive problems might not be sufficient to warrant imposing regulation on the market. In short, the Guidelines are not proper framework for evaluation of the economic question presented by the Petition.

2. The DPUC Has Not Demonstrated That Cellular Rates Are Discriminatory

The DPUC has expressed concerns with price discrimination, particularly with respect to wholesale prices between resellers and the cellular carriers' retail affiliates.[60] In order to determine whether there is price discrimination, charging different prices to different customers for the same service in the absence of cost justifications, differences in price must be compared with differences in costs.[61] The DPUC has not compared allegedly discriminatory prices with costs to determine whether they meet this definition nor has it submitted any evidence of such discrimination in states where regulation is currently absent.[62]

Nevertheless, the issue here is not whether there is any price discrimination, but whether such discrimination, if it exists is unjust and unreasonable.[63] Discrimination alone is not bad,

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[59] Id.

[60] DPUC Petition at 3.

[61] Owen Declaration at ¶ 54.

[62] Id.

[63] Id. at 55.